



ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

## OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON, DC 20301-3000

OCT 4 2002

Mr. Stan Phillippe  
Chair, Federal Facilities Research Subcommittee  
Association of State and Territorial Solid Waste Management Officials  
444 North Capitol Street, NW Suite 315  
Washington, DC 20001

Dear Mr. Phillippe:

Thank you for your August 20, 2002, letter regarding Department of Defense (DoD) and Service interim environmental restoration guidance. We appreciate the interest and commitment the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) have in protection of human health and the environment, and the completion of remediation at DoD sites. As you know, the Military Services have been hard at work trying to settle a series of disputed Records of Decision (RODs) over the past several months. These disputes arise over the proper mechanism to ensure long-term viability of land use or institutional controls (LUC/ICs) used to prevent exposure to residual contamination.

I welcome this opportunity to clear up any apparent misconceptions regarding the interim remediation guidance put in place for the pendency of these disputes. Ongoing environmental restoration efforts receive regulatory agency and public review and comment throughout the remediation process, including each distinct phase after the ROD. In fact, our policies and guidance explicitly provide for coordination and input from appropriate State authorities. It is my understanding that only cleanup actions that are fully coordinated with appropriate State authorities are proceeding under the interim guidance. If you are aware of any information to the contrary, you would deeply oblige me by making it known directly, so I may take corrective action.

We have been working with the US Environmental Protection Agency (EPA) for some time on the appropriate framework and requirements for proceeding with cleanup as the ROD negotiations proceeded. This summer EPA Assistant Administrator Marianne Horinko and I, in view of the progress we were making, agreed we should not suspend environmental restoration work where we have agreement on the physical remedy. This is the basis of our June 4, 2002, interim guidance.



You may know that we are engaged with Mr. Howard Roitman of Colorado, under the auspices of the Environmental Council of States (ECOS), in developing tools for long-term efficacy of land use controls that all parties should adhere to in developing land use controls. We value and encourage such discussions and the other collaborative efforts you mention, and would be sorry if a misunderstanding of our interim guidance had a negative effect on them. I am delighted to report to you, however, that this has not so far been the case.

Issues related to post-ROD authorities, particularly as they relate to LUC/ICs, are the natural results of our cleanup program maturing from investigations to active remediation. Many of the assumptions or circumstances that guided us and the States when these cleanups were initiated have changed, or new assumptions must now be taken into consideration. It is DoD's view that we collectively need to re-focus our environmental restoration program upon substantive performance of the remedial action and away from resource intensive document preparation and review that is costly and time consuming without commensurate environmental or human health benefit. We recognize that a fully adequate and documented investigation, feasibility study, and ROD are integral to achieving a successful remedy. Once the remedy is selected, however, DoD Components are already fully responsible and accountable under law to execute and maintain the remedy. Needless and expansive post-ROD documents and reports, along with multiple review and approval cycles, elevate procedure and process over substantive cleanup. They must be appropriately viewed as means toward the real goal – remedy in place and achieving the remediation objective.

We need to make our response process as efficient and cost-effective as it can be. Our engagement with EPA and States, therefore, has centered less on technical designations of respective post-ROD authorities and more on a systemic evolution of the cleanup process towards performance, efficiency and transparency. We have sought to incorporate the post-ROD phases of remedial actions into the ROD itself by ensuring ROD provisions fully focus on and capture essential performance requirements and factors; open and appropriate notifications to regulators; regulator access to all relevant information and our installations; and DoD accountability throughout remedy implementation, operation and maintenance, and review.

I am pleased that this "performance based" formula has met with considerable success among States and EPA Regions. At Hanscom Air Force Base (AFB), EPA Region 1, Massachusetts and the Air Force have executed a multi-site ROD with significant LUC/IC remedial components. As you are no doubt aware, we are within perhaps days of a similar agreement at Travis AFB

with EPA Region IX and California. The Air Force is optimistic that they are within weeks of reaching agreement with Virginia and EPA Region III on a similar ROD at Langley AFB, with the added twist and challenge that the ROD has been crafted and expanded to non-LUC/IC components of the remedy. The Air Force has also achieved regulatory agreement on similar RODs at two Base Realignment and Closure (BRAC) installations in Ohio and Illinois. The Army and Navy are also involved in multiple negotiations, so there is every reason to be encouraged that this new paradigm will succeed.

Accordingly, the interim guidance must not be taken out of its context, or understood as having greater scope than its circumstances warrant. The Department position has been and remains that EPA, States and citizens have important and specified participation, oversight and enforcement roles and authorities throughout the DoD response process, to include each distinct post-ROD phase. Each DoD installation will fully comply, as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 USC 9601 et seq.) and DoD policy alike require, with all nondiscriminatory substantive and procedural requirements of CERCLA and its implementation regulation, the National Contingency Plan (NCP). Congress has deliberately balanced and circumscribed DoD's delegated lead agency authorities and functions with functions and rights of EPA, States and citizens. Concomitant with our lead agency functions and authorities are the obligations to comply with all legal requirements and to fulfill all of our non-discretionary duties and functions.

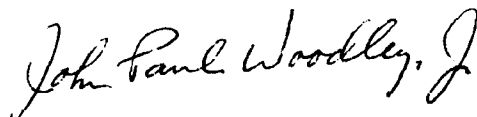
EPA, States and citizens have been provided oversight and enforcement authorities and remedies should we fail to either comply with legal requirements or to carry out our non-discretionary duties, to include any post-ROD phase. There can be no more fundamental obligation and responsibility we have than to take and maintain remedial actions selected and identified in the ROD that ensure protection of human health and the environment. If we fail to exercise our duties or to comply with CERCLA requirements, CERCLA appropriately enables citizens, a term which includes States, to seek civil penalties and injunctive relief in Federal district court (see 42 USC 9659). CERCLA furthermore allows States to seek enforcement in Federal district court of any Federal or State requirement, standard, criteria or limitation with which our remedial action is required to conform (see 42 USC 9621(e)(2)). Unequivocally, CERCLA applies in an enforceable manner to us in the post-ROD phases of remedial implementation, operation and maintenance, and review.

However, DoD must apply its resources as effectively and efficiently as possible to perform the actions necessary to protect human health and the

environment. We must ensure that our resources are directed to those aspects of cleanup that we know will meet that obligation – remedy performance.

My many years of service in State government have given me some appreciation of the vices inherent in unilateral Federal action, and I do not intend to encourage them in DoD by any policy or guidance. The Department gains by having input from State regulatory authorities, and I would be distressed to learn that this is not occurring. I hope we all will continue to work together as we transform the DoD environmental restoration program to a performance level we can all point to as a jointly earned success.

Very truly yours,

A handwritten signature in black ink, reading "John Paul Woodley, Jr." in a cursive script.

John Paul Woodley, Jr.  
Assistant Deputy Under Secretary of Defense  
(Environment)

cc:

Hon. Marianne Horinko, EPA

Mr. Howard Roitman, ECOS